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IN THE

Court of Appeals

The State of Arizona

DIVISION TWO

11439-2

FILED

MAR 17 1975

FARMERS INVESTMENT COMPANY, a corporation,

Appellant,

vs.

THE ANACONDA COMPANY, a corporation; AMAX COPPER MINES, INC., and THE ANACONDA COMPANY, as partners in and constituting ANAMAX MINING COMPANY, a partnership; ANAMAX MINING COMPANY, a partnership;

Appellees.

No. 2CA-CIV-1756

PIMA County
Superior Court
No. 116542

SNELL & WILMER
3100 VALLEY CENTER
PHOENIX, ARIZONA 85073

APPELLANT'S OPENING BRIEF

(124)

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PRELIMINARY MATTERS

FARMERS INVESTMENT COMPANY, an Arizona Corporation, Appellant, will be referred to as "FICO". The various Appellees, since they are jointly involved, will be referred to collectively as "ANAMAX" unless reference is made to a particular Appellee in which event that party will be named.

The Order entered by the trial judge, Judge Robert O. Royalston, made reference to his ruling in three other pending motions as requiring that he deny FICO's Application for Preliminary Injunction. Therefore, it will be necessary to make reference to these motions and the Court's rulings thereon in examining the legal basis for the ruling made by Judge Royalston in this matter.

These three motions involved a Summary Judgment Motion of FICO against defendants DUVAL CORPORATION and DUVAL SIERRITA CORPORATION; and separate Summary Judgment Motions by ANAMAX and DUVAL against Intervenor, CITY OF TUCSON.

The interests of the two DUVAL defendants are joint and, therefore, they will be referred

to simply as "DUVAL" and the CITY OF TUCSON will be referred to as "TUCSON".

One of the major legal issues involved in this appeal involves the legal effect of the designation of the State Land Department by Order No. 14, dated June 8, 1954 and amended February 15, 1956, of the "Sahuarita-Continental Subdivision of the Santa Cruz Basin" as a groundwater subdivision of the Santa Cruz Basin and the designation of the Sahuarita-Continental Critical Groundwater Area by Findings and Order of the State Land Department, dated October 14, 1954. In the interests of brevity, these two areas will be herein referred to respectfully as "Subdivision" and "Critical Area".

Unless otherwise indicated, all emphasis will have been added.

THE NATURE OF THE ACTION

FICO filed its application for a preliminary injunction against ANAMAX in the case then pending in the Superior Court of Pima County entitled:

"FARMERS INVESTMENT COMPANY, a corporation, Plaintiff,

vs.

"THE ANACONDA COMPANY, a corporation; AMERICAN SMELTING & REFINING COMPANY, a corporation; DUVAL CORPORATION, a corporation; PIMA MINING COMPANY, a corporation; BOYD LAND AND CATTLE COMPANY, a corporation; DUVAL SIERRITA CORPORATION, a corporation; AMAX COPPER MINES, INC. and THE ANACONDA COMPANY, as partners in and constituting ANAMAX MINING COMPANY, a partnership and ANAMAX MINING COMPANY; ANDREW L. BETTWY, as State Land Commissioner and THE STATE LAND DEPARTMENT, a department of the State of Arizona, Defendants."

This application for preliminary injunctive relief was directed only against the ANAMAX defendants. The application sought a preliminary injunction against use by ANAMAX of a water well ANAMAX was then drilling within the Critical Area for the purpose of withdrawing groundwater from the Sahuarita-Continental Critical Groundwater Area for use outside of that area but within the Subdivision.

The legality of use of groundwater from the Critical Area is the principal controversy in the pending case as between FICO and all the mining company defendants named therein, each of which carries on its operations generally the

same as ANAMAX but only ANAMAX had then attempted to enlarge its water use through drilling additional wells in the Critical Area. FICO, therefore, filed application for a preliminary injunction seeking injunctive relief against this further invasion of the groundwater resource of the Critical Area.

WHAT THE ISSUES WERE

The only issue, in the last analysis, was whether ANAMAX had the legal right to withdraw groundwater from within the boundaries of a duly designated Critical Groundwater Area and transport the water so withdrawn for use in its milling and leaching operations located outside of this Critical Area which use was unrelated to any beneficial use of the ground from which the groundwater was withdrawn.

HOW THE ISSUE WAS DECIDED AND WHAT JUDGMENT OR DECREE WAS GIVEN

The Court denied FICO's application for a preliminary injunction by Minute Entry (A.R. 369) and by formal written Order (A.R. 370-372).

CONCISE STATEMENT OF FACTS

Judge Royalston in a Minute Order of May 22, 1974, ruled (A.R. 369, 370) denying FICO a preliminary injunction:

> "...and it appearing to the Court that the ruling made by this Court on May 21, 1974 prevents the Plaintiff from being entitled to Preliminary Injunction,
>
> "IT IS ORDERED that the Application is denied solely on that basis."

In its Order of May 21, 1974, referred to above, the Court denied FICO's Motion for Summary Judgment against DUVAL and granted Motions by DUVAL and ANAMAX against Intervenor, CITY OF TUCSON, for Summary Judgment. The Court disposed of all three motions in one Minute Entry Order giving as the Court's reasons for the Order the following:

> "The Plaintiff's Motion for Summary Judgment as to Defendant Duval and Defendants Duval's and Anamax' Motion for Partial Summary Judgment having been taken under advisement, the Court finds as follows:
>
> "1. Arizona had adopted the reasonable use doctrine as to underground water.
>
> "2. Water may be pumped from one parcel and transported to another

parcel if both parcels overlie a common basin or supply and if the water is put to a reasonable use. Jarvis II.

"3. Water so transported must be used within the Groundwater Subdivision, with the exception of municipalities retiring lands from cultivation as provided in Jarvis II.

"THEREFORE, Plaintiff's Motion for Summary Judgment as to Duval is denied; Duval's and Anamax' Motions for Partial Summary Judgment are granted."

Thereafter by written Order the Court formally denied FICO's Application for Preliminary Injunctive Relief (A.R. 370-372).

FICO's Motion for Summary Judgment as against Duval appears at pages 46 through 85.1, Volume I, of the Abstract of Record. Duval's response to FICO's Motion is found at pages 153 through 255, Volume II of the Abstract.

The ANAMAX Motion for Summary Judgment against Tucson is found at pages 121 through 153, Volume II of the Abstract and the similar Motion of DUVAL against TUCSON is found at pages 86 through 116, Volume I of the Abstract.

The Response of the CITY OF TUCSON to both the ANAMAX and DUVAL Motions is found at pages 256

through 280, Volume II of the Abstract.

The facts material to the controversy may be stated as follows:

That portion of the Santa Cruz Basin which is involved in this litigation extends generally from the City of Tucson south to the Santa Cruz County line. The Santa Cruz Valley Basin extends generally in a north-south direction between the generally trending north and south mountain ranges which form the eastern and western boundary of the basin.

The FICO property while operated as one farm, consists of two separate parcels of farm land, the "Continental" farm and the "Sahuarita" farm located about two miles apart. Each parcel is very roughly rectangular in shape, approximately one to one and one-half miles wide and about six miles long. Both ranches lie in the bottom lands of the Santa Cruz Basin, both are within the Critical Area boundary, and each lies in a generally north-south direction.

The farmed area of these two farms consists of approximately 5,000 acres planted to pecan

trees divided between the two ranches and some small grains but not to a substantial acreage. The pecan planting program began in 1965 and was completed several years ago.

The mine pit of ANAMAX lies at a substantially higher elevation and approximately three miles westerly from the FICO Sahuarita farm, within the critical groundwater area. The mill, however, is located approximately one mile north of the north boundary and one and one-half miles west of the west boundary of the Critical Area, outside of the Critical Area.

The DUVAL mine and mill both lie several miles outside of the Critical Area and the mill sits on bedrock. There is no claim that there is a supply of groundwater underlying either the ANAMAX mill area or the DUVAL mill area sufficient in quantity to supply the water required by either defendant for its milling operations. The exhibits to the FICO Summary Judgment Motion graphically exhibit the geography of the area.

FICO, during the period prior to the time it turned its farming endeavors to pecan culture,

grew cotton and alfalfa, as well as small grains and used approximately 35,000 acres of groundwater annually for irrigation. This use had dropped substantially because of the immaturity of its pecan trees. However, as the trees approach maturity more water will be required and ultimately the water usage will equal the former irrigation requirements for cotton and other water using crops.

FICO obtains its irrigation water from wells located in various areas of its farms. It computes its water use by reference to power used in pumping.

The City of Tucson has a number of water wells which are located within the Critical Area and groundwater is pumped from these wells and transported for use in Tucson outside of the Critical Area and the Subdivision.

DUVAL wells from which it draws its groundwater for its milling operations are located in the valley generally south of FICO's Continental pecan tree orchard farm and within the Critical Groundwater Area. DUVAL pumps water approximately

seven miles to its mill. The location of its wells in relation to its mill is shown on the exhibits to FICO's Summary Judgment Motion against DUVAL, copies of which are also to be found with the Appendix. ANAMAX also has its wells in the Critical Area generally in the area between FICO's Continental farm and its Sahuarita farm and within the Critical Area and pumps the groundwater withdrawn over four miles to its mill which is located almost due north of the DUVAL mill.

The principal case was filed by FICO in November 1969, against THE ANACONDA COMPANY and the other three mining company defendants. In November 1973, AMAX COPPER MINES, INC. and the partnership of ANAMAX MINING COMPANY, consisting of THE ANACONDA COMPANY and AMAX COPPER MINES, INC., co-partners doing business as ANAMAX MINING COMPANY, were jointed as successors in interest to the mining operations in this area of THE ANACONDA COMPANY.

Each of the four mining Company defendants in this case had constructed large capacity water

wells within the Critical Area prior to the filing of suit by FICO and each had been pumping and continued to pump groundwater from these wells within the Critical Area and to transport the pumped groundwater for use, principally in connection with the milling operations of each company located outside of the Critical Area. This use of groundwater now approximates 65,000 acre feet annually.

Shortly prior to April 15, 1974, ANAMAX began drilling the first of two additional wells ANAMAX proposed to drill, equip and pump within the Critical Area for use of the groundwater outside of the Critical Area. These wells are to be in excess of 1,000 feet in depth and ANAMAX proposes to increase its groundwater use requirements by increasing its daily milling capacity from 30,000 tons of ore to 40,000 tons of ore and by putting into operation an oxide ore treatment plant to treat approximately 10,000 tons of ore. This increased water use will approximate 6,000 acre feet annually.

This new well has been located substantially equi-distant between the north boundary of FICO's

Continental orchard and the south boundary of its Sahuarita orchard in the central part of the Critical Area. Its production is to be tied into the gathering and pumping facilities of ANAMAX in the area and thereby transported to the milling area of ANAMAX. As a rule of thumb the milling operations of ANAMAX require one ton of fresh or "make up" water for each tone of ore processed.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the doctrine of reasonable use of groundwater by a landowner withdrawing groundwater from the supply underlying his land limits the right of such landowner to the use of such groundwater to a beneficial use made upon the land area from which the groundwater is withdrawn (assuming that such withdrawal injuriously affects the groundwater supply of an adjoining landowner.)

2. Whether a substantial withdrawal and use of groundwater, initiated after a land area has been designated as a critical groundwater area pursuant to A.R.S. §45-408, inflicts, as a matter of law, legal damage to the groundwater supply of

other landowners in the Critical Area who are then using groundwater lawfully and who require groundwater from the critical groundwater area supply for the beneficial use of their lands.

3. Whether an order designating a critical groundwater area as such by the State Land Department pursuant to A.R.S. §45-308, A.R.S. §45-309, A.R.S. §45-310, constitutes an adjudicative determination which may not be collaterally attacked or, whether it constitutes merely an investigative proceeding which has no binding effect upon the area landowners and which does not fix the rights, status, or obligations of persons or their property within the Critical Area.

4. Whether the designation as such of a groundwater subdivision of a groundwater basin, constitutes an adjudicative determination by the department that there is, in fact, a distinct body of groundwater underlying the Subdivision area which determination is binding upon all Subdivision landowners and not subject to collateral attack, or whether it constitutes an investigative informational determination made for informational

and administrative purposes but which does not fix, adjudicate or otherwise establish rights, status or obligations of persons or property within the Subdivision.

5. Whether a landowner farming within a duly designated critical groundwater area through use of groundwater pumped from wells within the Critical Area for irrigating farm crops grown in the Critical Area is entitled to injunctive relief preventing a mining corporation from drilling a large water well within the Critical Area and pumping and transporting groundwater away from the Critical Area for uses unrelated to the use and enjoyment of the lands overlying the water basin from which the water is withdrawn and which damages the water supply of the farmer through lowering and depleting his available water supply.

6. May a mining company which operates a mill located outside of a Critical Area but within the Subdivision in which this Critical Area is located withdraw groundwater from within the Critical Area and transport it to a place outside

of the Critical Area but within the Subdivision for use in processing its ore, if in fact at the place of use water wells could not be drilled and the water required to mill the ore obtained thereby from the water supply which underlies the Critical Area.

ARGUMENT

The several questions stated as "presented for review" are interrelated and can best, we believe, be argued together. However, because of the manner in which Judge Royalston stated his ruling and expressed his reasons supporting his conclusions, it is necessary in order to adequately examine and challenge the validity of Judge Royalston's ruling in this matter, to consider and review three other rulings made by Judge Royalston the day preceding the hearing upon and denial of FICO's Petition for Preliminary Injunctive Relief.

FICO had filed a Motion for Summary Judgment against DUVAL, supported by aerial photographs of the area of FICO's wells, DUVAL's wells and DUVAL's mine and mill, and other exhibits which

demonstrated that DUVAL's wells were in the valley generally adjacent to FICO's trees - to the south of the south border of the Continental farm - and well within the Critical Area. These photographs also demonstrated that the groundwater from the DUVAL wells was being transported some seven miles to the DUVAL mill area, well outside the Critical Area.

It was also demonstrated by a U.S. G.S. geological map of the area of the mill and mine supported by the affidavit of a qualified geologist verifying the map as a reliable indicator of the geology of the area that the mill was located in an area which was of an impervious, non-water bearing material and, this had been confirmed by deposition of a DUVAL official. As located the mill had no access to any groundwater which was a part of the basin underlying the Critical Area. 1/

1/ Appellant has included in the Abstract of Record and has brought up on this Appeal FICO's Motion For Summary Judgment against DUVAL and DUVAL's Response thereto, solely for the purpose of identifying and delineating the issues Judge Royalston had ruled upon in the Order denying FICO's Motion. For like reason the

-continued-

FICO's Motion, therefore, presented this issue of the legality of the pumping by DUVAL of groundwater from within a Critical Area and its use outside of that Area for a use unrelated to the beneficial use of the land from which the water was being pumped at a place of use which, while within the Subdivision, did not physically overlay the water basin and resource which was the source of supply to the Critical Area uses or have physical direct access to it.

1/ Continued from p. 16
Motions of DUVAL and ANAMAX for Summary Judgment against Tucson and the Response of Tucson thereto have been brought up as part of the record on this appeal. FICO does not intend to, nor do we believe it appropriate, to argue the merits of these three Orders other than as may be necessary in dealing with the denial of FICO's Preliminary Injunction Application by Judge Royalston. FICO believes that since Judge Royalston predicated the ruling made May 22nd solely upon the basis that his ruling in these three matters on May 21st "prevents the Plaintiff from being entitled to a Preliminary Injunction" (A.R. 370) "...and for the reasons stated by the Court in its Order for the Orders as entered on May 21, 1974 ... require that the Court deny on the merits the said Application and Amended Application of Farmers Investment Company for Preliminary Injunctive Relief." (A.R. 372) The issues as formulated in these collateral matters must, therefore, be formulated and explained.

While DUVAL's response set forth various reasons for denying FICO's Motion it is apparent from its "Memorandum of Points and Authorities" (A.R. 158-23) that, in DUVAL's view, "This case is controlled by the doctrine of reasonable use" (A.R. 160) and by the legal significance to be attached to the designation of an Area as a Subdivision of a groundwater basin pursuant to A.R.S. § 45-308:

> "Of far greater importance, however, are Duval's activities in relation to the statutorily designated Groundwater Subdivision. FICO has not once mentioned, much less discussed, the existence of the Sahuarita-Continental Groundwater Subdivision, so designated by the State Land Department pursuant to A.R.S. § 45-308.... (A.R. 161)
>
> "Although FICO works hard to muddy the waters, it remains that 'critical groundwater area' and 'groundwater subdivision' have separate, distinct and precise statutory definitions. And it is not the designation of the Critical Area but the designation of the Subdivision which is controlling here...." (A.R. 162, 163)

While DUVAL advanced various claims such as that it really used the water chiefly to flow its tailings to its tailing ponds within the Critical

Area and that this was the "use" it made of the groundwater, it is clear from the Court's ruling that the Court rejected these claims, or at least laid them aside, to confront and summarily rule upon the basic and controlling principles of water law upon which this case must ultimately turn.

That this is the true interpretation of the ruling is made clear by the Court's ruling upon the Summary Judgment motions filed by ANAMAX and DUVAL against TUCSON (ANAMAX Motion A.R. 121 et. seq., DUVAL Motion A.R. 86 et.seq.).

As will be apparent from a review of these two motions (A.R. 121 et.seq., A.R. 86 et.seq.), each company bottomed its claim upon the notion that the designation of a "subdivision" of a groundwater basin amounted to a final adjudication (absent an appeal) binding upon the world that as a fact a distinct body of groundwater underlay the entire subdivision and that, accordingly, each defendant, by reason of its location within the Subdivision, had the access required by Jarvis v. State Land Department, 104 Arz. 527, 456 P.2d 385

to this common supply and might, therefore, use water anywhere in the Subdivision so long as it was produced from lands within the Subdivision.

Each defendant also presented a distorted reading of Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173, as to the meaning of the doctrine of reasonable use of groundwater. Each attached to the ex parte, administrative determination of the State Land Department the same legal consequences as flow from the quasi-adversary determination after notice, evidentiary hearing and findings of fact required for the designation of a Critical Area and which follow from the designation of a critical groundwater area. Each ignored the fact that by statute the findings of fact and Order designating the Critical Area "shall be final and conclusive" when published as required by the statute (A.R.S. § 45-310) and that no such conclusive effect was given by statute to a Subdivision designation.

And Judge Royalston agreed with these contentions.

Counsel and Court were both wrong - both overlooked the clear distinction between "investigative" and "adjudicative" findings. Both overlooked the fundamental requirements of procedural due process.

The Order Judge Royalston entered on May 21, 1974 (A.R. 368, 369) gave as the Court's reasons for denying FICO's Summary Judgment Motion as to DUVAL and granting the ANAMAX and DUVAL Motions against TUCSON the following:

> "The Plaintiff's Motion for Summary Judgment as to Defendant Duval and Defendants Duval's and Anamax' Motion for Partial Summary Judgment having been taken under advisement, the Court finds as follows:
>
> "1. Arizona had adopted the reasonable use doctrine as to underground water.
>
> "2. Water may be pumped from one parcel and transported to another parcel if both parcels overlie a common basin or supply and if the water is put to a reasonable use. Jarvis II.
>
> "3. Water so transported must be used within the Groundwater Subdivision, with the exception of municipalities retiring lands from cultivation as provided in Jarvis II.
>
> "Therefore, Plaintiff's Motion for Summary Judgment as to Duval is

denied; Duval's and Anamax' Motions for Partial Summary Judgment are granted."

Insofar as the Court's ruling disposed of the legal issues presented by FICO's Summary Judgment Motion against DUVAL, the Court ruled that a "subdivision" designation established as a matter of law that the entire subdivision overlay a distinct body of groundwater and that, therefore, FICO could not complain if DUVAL pumped water from within the Critical Area and used it outside of the Critical Area so long as it was used within the subdivision.

The ruling upon the TUCSON motions makes clear this was the Court's understanding of the applicable law. TUCSON was pumping groundwater from within the Sahuarita-Continental Subdivision and transporting it for use outside the Subdivision. The Sahuarita-Continental Subdivision and the Tucson Subdivision <u>are subdivisions of the same Santa Cruz Groundwater Basin</u>, but nonetheless the Court held such use by Tucson unlawful. As will be presently demonstrated this holding is not supported by any principles of

statutory construction with which we are familiar or by logic or reason.

Before reviewing the statutory provisions applicable to this legal problem FICO first points out that the reasoning of defendants, accepted by the trial court leads, logically, to a very curious result.

Defendants reason that the designation of the Sahuarita-Continental Subdivision under A.R.S. § 45-303 constitutes an adjudication that the entire land area within the boundary of the Subdivision in fact overlies a distinct body of groundwater. This being true, say the defendants, we may pump from any location within the Subdivision and transport and use the pumped water anywhere in the Subdivision for a beneficial purpose since there is at the place of use, as a matter of law, access to this common "distinct body of groundwater" at that location since it is located within the Subdivision.

However, this same statute also authorized the Department to designate Groundwater Basins in precisely the same terms as are used to authorize

the designation of subdivisions except that a designated Subdivision is required to be subdivision of a groundwater basin.

This statute A.R.S. § 45-310 defines "Groundwater basin" as an area of land overlaying "as nearly as may be determined by known facts, a distinct body of groundwater..." and defines Groundwater Subdivision to mean an area of land overlaying "as nearly as may be determined by known facts, a distinct body of groundwater. It may consist of any determinable part of groundwater basin."

The defendants reasoned, and the Court agreed, that since the statute defines a subdivision of a groundwater basin as a "distinct body of groundwater" the designation of a subdivision amounts to a determination, as a fact, which, absent an appeal may not be challenged, that a body of groundwater common to the entire land area within the subdivision, underlies the subdivision. Therefore, say the defendants, our mills, even though sitting on bedrock, as a matter of law, have access to this common body of groundwater.

Precisely the same statutory language which controls the designation of a subdivision is applicable to the designation of a groundwater basin. Precisely the same findings are required and, therefore, precisely the same legal effects must flow from the designation of a basin as flow from the designation of a subdivision.

Official orders and maps of the State Land Department, a state agency, are subject to judicial notice.

State ex rel Smith vs. Bohannan, 101 Ariz. 520, 421 P.2d 877; Jarvis vs. State Land Department, 104 Ariz. 527, 456 P.2d 385.

The various orders and maps of record in the State Land Department designating the Santa Cruz Basin and the various subdivisions of that basin are therefore before the Court.

Order No. 1 of the State Land Department entered by O. C. Williams as State Land Commissioner dated December 21, 1948, designated the Santa Cruz Groundwater Basin. In effect it designated the water basin underlaying the

drainage or watershed area of the Santa Cruz Basin as the groundwater basin.

The Sahuarita-Continental Subdivision was designated by Order No. 14 entered by Roger Ernst as State Land Commissioner, dated June 8, 1954, amended by Order dated February 15, 1956, as a subdivision of the Santa Cruz Basin. The official map entitled "Map of Sahuarita-Continental Subdivision of the Santa Cruz Basin as established June 8, 1954 by Order No. 14" is on file in the State Land Department. This map and these orders will be found in the appendix to this Brief.

The Sahuarita-Continental Subdivision is designated as a subdivision of the Santa Cruz Groundwater Basin. So also is the Marana Subdivision designated as a subdivision of the Santa Cruz Groundwater Basin by Order No. 7 of the department dated October 22, 1951, and altered by Order No. 12 dated June 8, 1954. The Altar-Avra valley lies within the Marana Subdivision.

If the designation of the Santa Cruz Groundwater Basin as a groundwater basin constitutes an adjudication that the entire basin is underlaid

by a "distinct body of groundwater" then the Sahuarita-Continental Subdivision and the Marana Subdivision are all part of and both overlay the same distinct body of groundwater common to both areas since both are within the same "distinct body of groundwater". (We do not pursue the same reasoning as to the other designated subdivisions of the Santa Cruz Basin for obvious reasons.)

If the trial Court's ruling:

> "Water may be pumped from one parcel and transported to another parcel if both parcels overlie a common basin or supply and if the water is put to a reasonable use"

is sound, then the trial Court's further ruling:

> "Water so transported must be used within the Groundwater Subdivision, with the exception of municipalities retiring lands from cultivation as provided in Jarvis II"

is without support in reason or logic for there is no distinction which may fairly be drawn between the language of the statute defining a groundwater basin and authorizing its designation and the language defining a subdivision and authorizing its designation.

In short, if the action by the Department in designating the Santa Cruz Basin as a groundwater basin has the same adjudicative effect, i.e. that the entire basin is as a matter of law underlaid by a distinct body of groundwater common to the entire basin - as defendants contend follows the designation of a Subdivision of that basin - then the Court's decision as to Tucson must be wrong, since Tucson plainly lies in the Santa Cruz Basin. And, since both Tucson and the Altar-Avra Valleys are both in the Santa Cruz Basin, Jarvis I and Jarvis II must have been erroneously decided.

A review of the pertinent provisions of the groundwater code applicable to the designation of groundwater basins, and subdivisions of groundwater basins and of critical groundwater areas points up that a designation of a basin (or a subdivision of a basin) and of critical areas have very apparent different purposes and are attended by very dissimilar legal results.

The basin and subdivision designation is an ex parte administrative act having its purpose

gathering information as to groundwater resources of the state for the benefit of the public and also to assist the Department in administering its responsibilities.

Section 45-302, defining the powers and duties of the Department requires it to:

> "2. Compile and maintain records of the various groundwater basins and subdivisions in the state, together with factual data as to the safe annual yield of ground water and the use thereof in such basins and subdivisions to the end that the public may have an opportunity to understand groundwater resources and the steps necessary to obtain its maximum beneficial use."

Designation of a groundwater basin or subdivision is a condition precedent to the authority granted by § 45-302(C) to enter upon land and inspect wells or other works to obtain "factual data in a groundwater basin or any subdivision thereof." The importance of such designation from an administrative standpoint is emphasized by § 45-303(D) which provides:

> "D. The designation or alteration of the boundaries of such groundwater basin or subdivision shall give the department reasonable access to the lands included therein, but shall

not be construed as giving authority to regulate the drilling or operation of wells in the groundwater basin or subdivision."

This underscored provision of § 45-302(C) in itself clearly negatives the claims of defendants that the designation of a basin or a subdivision is accompanied by a status fixing result.

The map the department is required to make and file prior to designating a basin or subdivision thereof must clearly show and describe the included lands "together with adequate factual data justifying the designation or alteration of the boundaries of the groundwater basin or subdivision." The statute directs that this map and factual data are required to remain of public record in the State Land Department office, "available for examination by the public."

Finally and most significantly, it is the absence of statutory provisions, rather than those found, which is decisive. The statutes are wholly silent as to any notice requirement to the landowner of the action the department proposes to take, and of any right to be heard upon such an all important finding if in fact it

has the legal consequences defendants assert. Further, there is no provision requiring that the landowner be notified that such a designation has been made so that a seasonable appeal may be taken and no provision requiring that the designation shall be made of record in the County Recorders office notifying purchasers of land of this cloud on the title to lands being purchased.

The statutes authorizing the designation of a critical groundwater area are plainly designed to achieve legally different results insofar as the lands within the area are to be effected by the designation and in doing so to give full play to the police power of the state within the limitations of the due process clauses of the State and Federal constitutions. Since the landowner's rights with respect to what use shall be made of the lands within the area are to be severely limited, insofar as use of groundwater is involved in that use, due process requires notice and hearing provisions not found in, or legally required to be provided, in the basin and subdivision designation procedures.

The initiation procedures upon careful reading are not entirely the same. The statutes authorize initiation by the department on its own motion in similar terms but the petition procedure provisions have significant differences "...upon petition by not less than twenty-five users, or one fourth of the users of groundwater (within the exterior boundaries of) in the groundwater basin or subdivision (within which the lands proposed to be included in the critical groundwater area are located) whichever is the lesser number." (A.R.S. § 45-308)

(The material enclosed within parentheses and underlined is found in the critical area designation statute and not in the statute authorizing designation of a basin or a subdivision of a basin).

Thus, at the outset we find that plainly, unless the department itself initiates the critical designation, the department must have designated a basin or a subdivision before a critical area may be designated upon petition. (While not here in issue, it seems probable that

such a basin or subdivision designation must also have been made by the department prior to acting upon its own motion to designate a critical area for the reason among others, that the qualification of "an interested person" who may appear and support or oppose the designation of a critical area proposed must be established prior to the hearing).

(So also, while also not in issue here, the contention of defendants that the statute is applicable only to users of water for irrigation purposes is not sound. "Not less than twenty-five users" plainly refers to "non irrigation users" since it is followed by the phrase "or one fourth of the users of groundwater" which last term is a term of art for purposes of the statute since this phrase is defined to mean "users of water for irrigation purposes" (A.R.S. § 45-301 (13)). If each clause includes the same persons - users of water for irrigation - the conclusion must be that the legislature was employing redundant phraseology - "Twenty-five users of groundwater for irrigation" or "one-fourth of the users of groundwater for irrigation" is meaning less.

Section 45-309(B)(C) requires a noticed public hearing before an area may be designated as "critical" which notice must include the legal description of the lands to be included, the time and place of the hearing, must be published for at least four weeks in a newspaper of general circulation in which the lands or any part thereof are located. The notice feature is amplified by the requirement that a map "clearly showing and describing all lands proposed to be included" must be published as part of the notice. Significantly the statute then provides: "The publication of notice when completed shall be deemed to be sufficient notice of the hearing to all interested persons". (A.R.S. § 45-309(C))

Section 45-309(D) provides any interested person may appear, in person or by attorney and submit evidence for or against the designation.

Section 45-310(A) requires that written findings of fact must be made after the hearing and if it is determined that a critical area is to be designated a written Order must be entered "designating the critical groundwater area . . . pursuant to the finding."

Section 45-310(B) requires that the finding of fact and order be published in the same manner as the notice of hearing and that "when so published shall be final and conclusive unless an appeal therefrom is taken...."

Section 45-310(C) requires that a true copy of the map of the Critical Area, as designated shall also be filed in the office of the Recorder of the County or Counties in which the Critical Groundwater Area is located.

Section 45-311 requires that the same proceedings must be followed to dissolve or alter a Critical Groundwater Area as are provided for designating such an area and forbids reception by the department of a petition to abolish a Critical Area for a period of one year following "rejection of an identical petition."

FICO does not believe that an extensive review of case law is in order to demonstrate that if the statutes authorizing the designation of groundwater basins and subdivisions are given the conclusive effect defendants contend for the conclusion is inescapable that due process

guarantees of our State and Federal constitution are violated. Certainly under our groundwater decisions a statute which makes conclusive without notice or hearing a finding and order that the mill site of mining company "A" which sits upon bedrock with no groundwater subjacent to its mill nonetheless as a matter of law has access to and right to take groundwater subjacent to the lands of Farmer "B" several miles away violates elementary principles of due process. In Jarvis I (104 Ariz. 527, 456 P.2d 385, 389) the Supreme Court said:

> "We said in State v. Anway, supra, (87 Ariz. 206, 349 P.2d 774) ... that the doctrine of reasonable use '...is a rule of property...'."

and at 456 P.2d 385, 387, the Court said:

> "The rule that the owner of land owns the water beneath the soil has been the continuous holding of this Court for seventy-five years."

In Hannah v. Larche, 363 U.S. 420, 4 L ed 2d 1307, 80 S.Ct. 1502, the United States Supreme Court, in considering the question of procedural due process said:

> "'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used."

The annotator in 18 A.L.R.2d, page 570 summarizes the rule:

> "In accordance with the rules stated in Sections 3 and 4, supra, a statute which declares the result of an ex parte investigation to be conclusive upon an administrative tribunal is invalid as in violation of due process."

Justice Levi Udall in Gibbons v. Arizona Corporation Commission, 95 Ariz. 343, 390 P.2d 582, 585 said:

> "It is, of course, firmly established that the law requires adequate notice of proceedings to persons whose interests are affected thereby...."

and see discussion as to distinction between "investigation" and "hearing" Ann. 85 L ed. 561, 562.

In re Securities and Exchange Commission, 84 F.2d 316 (C.A.,Second Circuit, 1936) is a case often reviewed for its discussion of the difference between an investigative proceeding and an adjudicative proceeding. The Court there said:

> "[1] Section 21(a), 15 U.S.C.A. § 78 u (a), empowers the Commission to make such investigations as it deems necessary to determine whether any person has violated, or is about to violate, the act, and gives the complementary power to compel the attendance of witnesses....Provision is made that the Commission may in its discretion publish the information obtained. While this latter authority gives an advantage which might be abused, this is not a sufficient reason to forbid or restrain this preparatory investigation. An investigation is conducted in order to determine whether the facts justify a determination by the Commission to hold a 'hearing' or to bring suit for injunctive relief. The investigation makes no determination or decision between the parties for there are no parties. This fundamental distinction between an investigation and a hearing has received judicial recognition Cf. Lindsay v. Allen, 113 Tenn. 517, 82 S.W. 648; In re Edwards, 44 Idaho, 163, 255 P.906. A hearing presupposes a formal proceeding upon notice with adversary parties, and with issues on which evidence may be adduced by both parties and in which all have a right to be heard. See State v. Milhollon, 50 N.D. 184, 195 N.W. 292, 295."

Bowles v. Baer, 142 F.2d 787 (C.A. Seventh Circuit, 1944) also discusses the distinction as follows:

> "[1] This was an investigation, not a hearing. Investigations are informal proceedings held to obtain information to govern future action and are not proceedings in which action is taken against anyone. Investigations, such as this by the OPA, have no parties and are usually held in private, just as a grand jury carries on its investigations in private. Investigations may very properly be held in private. Woolley v. United States, 9 Cir., 97 F.2d 258, 262; In re Securities and Exchange Commission, D.C., 14 F.Supp. 417, 418, affirmed, 2 Cir., 84 F.2d 316, reversed for mootness, Bracken v. Securities and Exchange Comm., 299 U.S. 504, 57 S.Ct. 18, 81 L.Ed. 374.
>
> "On the other hand, in a hearing there are parties, and issues of law and of fact to be tried, and at the conclusion of the hearing, action is taken which may materially affect the rights of the parties. Hearings are usually open to the public. The parties are entitled to be present in person and by counsel and to record the proceedings or be provided with a record by the hearing body. The parties to a hearing are entitled to participate therein, to argue, and to brief their case, and, if findings of fact and an order are made, they are entitled to be furnished copies. Morgan v. United States, 304 U.S. 1, 58 S.Ct. 999, 82 L.Ed. 1129. These essential differences between an investigation and a hearing are what permit the two proceedings to be conducted in different manners."

See also State v. Mees (Minn.) 49 N.W.2d 386, 27 A.R.R.2d 1197; Jordan v. American Eagle Fire Ins. Co., 169 F.2d 281, 285; Wood County Bank v. Camp, 348 F.Supp. 1321; United States v. Bishop Processing Company, 287 F.Supp. 624 (1964) "The Requirements of Opportunity to Be Heard in The Administrative Process", 51 Yale L.R. 1093 (1942), 2 Am.Jur.2d Sec. 399, page 204, et.seq. 73 C.J.S. 404, Sec. 78, et.seq.

FICO respectfully argues that the Arizona Groundwater Code, read perceptively, does not bear the construction the trial court placed upon it, particularly when it is realized that, if so construed, it would contravene basic considerations of fairness and constitutional guarantees.

LEGISLATIVE HISTORY AND ADMINISTRATIVE CONSTRUCTION OF THE GROUNDWATER CODE DOES NOT SUPPORT DEFENDANTS' POSITION

The claims of defendants that the legislature intended to open the door to unlimited exploitation of a Critical Area water resource for the benefit of the lands of an entire Subdivision or basin is not supported by legislative history or by

the administrative interpretation and application of the code provisions relating to designation of groundwater basins and subdivisions following its adoption.

Justice McFarland, in his especially concurring opinion in Jarvis I, supra, (456 P.2d 390, 393) outlines briefly the long struggle to reach agreement upon an underground water code and we do not repeat it here. At page 393 Justice McFarland also considers one of the very claims which defendants now make and said:

> "The City of Tucson in its brief cites § 45-301 and § 45-322, A.R.S. It contends that the provisions of these sections do not relate in any way to the extraction of water from land for domestic and industrial uses.
>
> "We cannot interpret the provisions of these sections to permit the transportation of water pumped from wells in a critical area to another area for the purposes set forth therein to the detriment of the rights of the users in the critical area. Such an interpretation might permit industries to practically exhaust a water supply in a critical area to the detriment of established rights. Such an interpretation would thereby permit the defeat of the objectives of the Legislature in passing the underground water code for the protection of the rights of the users and the other objectives set forth in the governor's message to the Legislature."

Our groundwater code containing most of the basic provisions found in the code today was enacted as Chapter 5, Laws of 1948, 6th Special Session, by the Legislature.

In Section 3 of Chapter 5 the Legislature declared the public policy of the state to be:

> "It is therefore declared to be the public policy of the state, in the interest of the agricultural stability, general economy and welfare of the state and its citizens to conserve and protect the water resources of the state from destruction, and for that purpose to provide reasonable regulations for the designation and establishment of such critical groundwater areas, as may now or hereafter exist within the state."

The Twentieth Legislature, Second Regular Session, enacted Senate Bill 56 creating the Underground Water Commission "to make a comprehensive study of the source, extent and nature of the underground waters of Arizona" and on January 1, 1953 the Commission submitted a forty-one volume report to the Governor and the Legislature.

Following the filing of this report the Legislature adopted Chapter 42, 21st Legislature effective March 18, 1953. This was labeled as "interim" legislation and established by a metes and bounds

description the exterior boundaries of a restricted area in which any new irrigation development was forbidden. The Sahuarita-Continental Critical Area exterior boundaries substantially track the metes and bounds description of the restricted area, insofar as this part of the Upper Santa Cruz Basin was included in this "restricted area".

The coincidence between "restricted area" boundaries and the Critical Area boundaries as designated, resulted from a directive contained in Chapter 160, 21st Legislature, Second Session, which transferred all groundwater commission records, etc. to the State Land Department and required that the State Land Commissioner "Immediately upon the enactment of this Act, ... promptly publish notice of hearings to designate as a Critical Groundwater Area or as Critical Groundwater Areas the whole or so much of the restricted area described in Chapter 42, 21st Legislature, First Regular Session, as is not already designated as critical groundwater areas and which appear from factual data not to have

sufficient groundwater to provide a reasonably safe supply for irrigation of the cultivated lands therein at current rates of withdrawal and shall promptly undertake hearings, proceedings, and actions authorized and provided by the groundwater code of 1948 in reference thereto."

As appears from the State Land Department Map, dated October 15, 1954, as of that date seven critical groundwater areas had been designated and there had been alterations, by addition of areas, of four of these previously designated areas. It also appears that four of these critical areas were designated in the 1949-1951 period, among these the Salt River Valley Area, "created" September 1, 1951, which included the Laveen lands, the subject of the Bristor I and II litigation.

There is nothing in any of the legislative history of how our groundwater code evolved to indicate that a "subdivision" or a "basin" was considered by our legislature as performing any function in the regulatory scheme other than making available outlines of areas which for

administrative purposes should be considered as a probable source of groundwater. Such a designation was intended to give the department access to areas of probable supply for purposes of further study and fact gathering and as indicating areas of interest for further investigation but, more importantly, as pinpointing areas where regulation of use might be indicated through a critical area investigation and proceeding. Also, such designation identified the lands which would be the subject of a critical groundwater area investigation so that the owners thereof might be given notice of the designation proceedings and an opportunity to be heard in respect to the proposal.

That this is true follows from (a) Section 45-301 defininig a Critical Area in terms of being in a "basin" or "subdivision thereof", (b) if initiated by petition the identity of signers must be established as either "users of water" or "users of groundwater" "within the exterior boundaries of the groundwater basin, or subdivision within which the lands proposed to be included in

the critical groundwater area are located", (NOTE: While the definition of "Critical Area" would seem to require that it must include an entire basin or subdivision, the foregoing statutory provisions plus the implicit requirement that the order made upon the hearing, if an area is designated, must be the product of the hearing proceeding evidence, makes it plain that the preliminary designation of a subdivision or basin is merely the first step in the proceedings looking to a factual finding as to the true critical area boundaries) (c) the identity of "persons interested" who may appear and be heard on the hearing and who may appeal if dissatisfied with the finding and order can only be established if a basin or subdivision has been established prior to the notice and hearing so that those who may be helped or hurt by the designation are identified.

DUVAL complained in its response to the FICO Summary Judgment Motion (A.R. 161) that FICO has "not once mentioned or discussed" the subdivision statute or the fact of the subdivision designation.

FICO's failure to consider the "subdivision designation" as of importance in the legislative regulatory scheme simply reflects the fact that nowhere (after providing for the initial designation of basins and subdivisions) does the subdivision play any part in the legislative regulatory scheme.

So also, the State Land Commissioner and the State Land Department did not attach the legal significance to the designation of a "basin" or a "subdivision" which defendants would read into the ianguage of the statute authorizing it.

Order No. 1, entered by Commissioner O.C. Williams, dated December 21, 1948, designated the Santa Cruz Groundwater Basin. A copy is to be found with the Appendix. The designation is "that the area described generally as that basin containing all the groundwater underlying the Alluvial fill between the mountain ranges within the drainage basin of the Santa Cruz River ... shown on Map 1 ..." is designated as the Santa Cruz Groundwater Basin.

Order No. 7, dated October 22, 1951, which designated the Marana Subdivision of the Santa Cruz Groundwater Basin was entered by W. W. Lane, State Land Commissioner. It established precise boundaries for the subdivision. However, before the Marana Critical Groundwater Area was designated October 14, 1954, Order No. 7 was amended by Order No. 12 which eliminated the precise definition and substituted the definition of the Marana Subdivision boundaries to read:

> "... described generally as bounded on the north by a line from the Tortolita Mountains to the Silver Bell Mountains; on the east by the Tortolita Mountains and Tucson Mountains; on the south by the Sierrita Mountains; on the west by the Coyote Rashruge and Silver Bell Mountains..."

The boundaries of the Marana Critical Area, as it is described in the Publication Notice in the Eloy Enterprise, dated July 1954, are by metes and bounds, describing a precise area.

So also, the Order designating the Sahuarita-Continental Subdivision makes no attempt to delineate, other than in general terms, a water

bearing area. In fact, the map filed showing the boundaries of the subdivision belies the notion that a serious attempt was made to outline boundaries of a truly water bearing area since it incorporates the major part of mountain ranges and is plainly only an attempt to outline a general watershed area.

The description reads from Amended Order No. 14, dated February 15, 1956:

> "... the area described generally as bounded on the north by a line from the San Xavier Hills to the Pineon Mountains; on the east by the Empire and Santa Rita Mountains; on the south by the San Caytana Mountains; on the west by the Tumacacori and Sierrita Mountains; ..."

The map shows a subdivision line, on the east mostly on the crest of the mountain ranges and elsewhere plainly including large mountain areas.

Additionally, in much of the land areas crossed by the Sudivision line as it appears on the map, there is no way to ascertain where the subdivision boundary actually begins or ends. The line as drawn, recognizing that its width is to be measured as against six mile square townships must approximate well in excess of one mile in

width. Not a large point perhaps, but it does not square with the notion that the department attached any legal significance to the designation as giving rise to valuable water rights, or a more precise line would have been drawn.

DUVAL argues that the critical area designation was intended only to control irrigation use of groundwater and that, therefore, withdrawal of groundwater from within a critical area and exporting it for a non-irrigation use outside of the critical area is permissable.

This Court held directly to the contrary in Jarvis I and II, a holding emphasized in the concurring opinion of Justice McFarland.

Again, the administrative interpretation and application of the code is also to the contrary.

Order No. 13 of the State Land Department designated the Tucson Subdivision of the Santa Cruz Basin. This Order was entered June 8, 1954. On October 15, 1954, the Department designated the Tucson Critical Groundwater Area.

The Subdivision boundary as designated is again an arbitrary line which includes parts of

the Santa Catalina, the Tanque Verde, the Tucson and the Tortalita Mountains - plainly not water bearing areas. The Tucson Critical Area is largely made up of the area occupied by Tucson and its peripheral urban areas. Certainly, the Land Department did not consider this was an area where irrigated farming, alone, was to be controlled.

Defendants assert that the legislature intended that agricultural interests must husband a water resource in critical supply by freezing uses as of the date a critical area is designated and by abandoning plans for developing any new agricultural lands in the critical area, thereby preserving this resource for future use.

But, say defendants, this does not mean that in later years, as has happened in this very critical area, industry may not come along and exploit the water resource conserved by the farmer, by drilling large wells in the Critical Area, and transporting very large quantities of groundwater out of the critical area drawn from this conserved water resource; and that this is true,

despite the fact a great part of the water so used is still available in the ground because the farmer landowner farming in the area has used the resource frugally as directed by the public policy statute of the State.

Plainly, the Legislature did not intend such a result as Justice McFarland recognized in his concurring opinion.

THE REASONABLE USE DOCTRINE

Defendants DUVAL and ANAMAX appear to in effect concede that the use which these mining defendants are making of the groundwater transported for use outside the Critical Area is a legal use only if their "subdivision theory" is valid. Plainly, that is the sole support for the conclusion reached by Judge Royalston in denying FICO's Summary Judgment against DUVAL and in granting the ANAMAX and DUVAL Summary Judgment Motions against TUCSON. And by express words in the Order denying the FICO Application for a preliminary injunction against ANAMAX, Judge Royalston found that the use ANAMAX intended to make of the additional water withdrawal it

proposed to make by use of its new well was a legal use because it was to be used within the subdivision.

Defendants have, of course, presented from time to time various other theories as to the meaning of Bristor II and Jarvis I and II. FICO believes that both counsel for defendants and the Court must have read Jarvis v. State Land Department, 104 Ariz. 527, 456 P.2d 385, (hereinafter Jarvis II) as in effect overruling Bristor v. Cheatham, 75 Ariz. 227, 225 P.2d 173 (hereinafter Bristor II) at least in part as otherwise they could not reasonably have reached the conclusions they assert. It is only by overruling Bristor in part and by reading into the statutes authorizing designation of groundwater basins and subdivisions thereof a meaning and purpose not intended nor reasonably to be found therein (as well as constitutionally impermissible) that the Court's rulings of May 21, 1974, can be sustained. And, if the reasoning supporting those rulings is legally unsound, so also is the ruling of May 22, 1974, here on appeal.

Defendants argue that the effect of the Court's holding in Jarvis II that Tucson might pump from any location in the Avra-Altar Valley of the Marana Critical Area the amount of water which historically had been pumped for agricultural use anywhere in the Critical Area and transport this amount of the water out of the Marana Critical Area amounts to a ruling that such pumping and use of water was permitted regardless of its effect upon a landowner farming land immediately adjoining Tucson's pump site even though the land withdrawn from agricultural use by Tucson in order to justify the pumping was located miles away. Such a conclusion may be read into the holding of the Court but it plainly was not the intended meaning.

The Court in Jarvis II was considering the rights in the aggregate of landowners of an entire water basin versus rights of a municipality miles away. The Court was not considering nor did it have before it the rights of groundwater users in a Critical Area versus other users of groundwater in the same Critical Area.

A review of the map of the Marana Critical Area, designated by Order of Roger Ernst, State Land Commissioner, dated October 14, 1954, indicates that the area is approximately 36 miles long, north and south, and from 12 to 18 miles wide from east to west.

It seems clear that if a TUCSON well site is located at the north end of the Valley, but TUCSON has purchased a section of farm land at the south end of the Valley to permit TUCSON to pump water from the north end well site and transport it out of the area, if the owner of land adjoining the north end well site is thereby damaged, the rule enunciated in Bristor II is violated. To emphasize the problem, assume TUCSON acquires five well sites at appropriately spaced intervals in the lower end of the Valley in order to gather and transport the water through one pipe line facility but the agricultural lands it acquires and retires from cultivation are at the upper end of the Valley, may TUCSON draw down the water table of adjoining landowners in the lower end of the valley to their detriment

while the farmers in the upper end of the Valley adjoining the farm lands acquired by TUCSON and retired from irrigated farming reap a windfall through the improvement to the water table of that area?

Percolating groundwater moves very slowly depending among other things upon the permeability of the material through which it moves and the gradient or slope of the water table. The cone of depression of the pumping well greatly sharpens or accentuates the gradient toward the well and thereby the groundwater in the immediate area of the pumping well moves rapidly into the well area as compared to the general movement of the groundwater with the result that the immediate area becomes a "cone of depression" but the effect at some distance away is negligible. See Tolman "Ground Water" McGraw-Hill 1937, Chapter VIII, p. 190, et.seq. and Chapter XIII, p. 380, et.seq.; Chow "Hand-book of Applied Hydrology" McGraw-Hill 1964.

The court in Bristor II referred to Bristor I, 73 Ariz. 228, 240 P.2d 185 for a recitation

of the factual background of that case. The court there stated the factual allegations upon which the case was to be decided, in part, as follows:

> "They (plaintiffs) further allege there is a common supply of underground water underlying the premises of plaintiffs and defendants; that since 1916 their domestic supply of water has been, and is, derived exclusively from this underground supply ..."
>
> * * *
>
> "That defendants ... are taking the water by means of powerful pumps from this common supply and are conveying it off the premises from which it is pumped to other lands owned by defendants, approximately three miles distant, where they are using it in reclaiming from the desert other land not adjacent to the land from which the water is being pumped." (Emphasis added)

Bristor I was decided December 12, 1952 and Bristor II was decided March 14, 1953. The Salt River Critical Area was designated September 1, 1951. In Bristor I the Court located the lands of the parties

> "... these lands are located one and a half miles south and one mile east of Laveen; and that defendants lands are west of plaintiffs' lands".

An examination of the Critical Area Map of the Salt River Critical Area discloses that Laveen

is well within this Critical Area and that as described by the Court both the plaintiffs' and defendants' lands were within the Critical Area. It is further to be remembered that the Court in Bristor II made specific reference to Bristor I for the applicable fact statement.

While the Court did not deal specifically with the groundwater code in either Bristor I or Bristor II the Critical Area law was then in effect as was the law authorizing designations of basins and subdivisions of basins (Chap. 5, Laws 1948, 6th S. S.) and the Salt River Valley Critical Area had been designated September 1, 1951.

The Court specifically pointed out that the lands of both plaintiffs and defendants overlay a common supply and we assume the Court realized that the Critical Area included the lands of both plaintiffs and defendants. The holding of Bristor II clearly denounced removal of groundwater for use unrelated to the land producing the water which damaged an adjoining landowner as unlawful, without reference to whether such use

was made within or outside the boundaries of a critical area.

DUVAL cited Bristor v. Cheatham II as furnishing full support for its claim that if its use is a beneficial use and made within the Subdivision area, it is a reasonable and lawful use. DUVAL argued that equitable considerations come into play in determining if a use of water is "reasonable" i.e., permitted for DUVAL said:

> "But this tells the story of the water balance only. It does not begin to tell the story of the other equitable and factual circumstances involved. What is a reasonable use must depend upon all the facts and circumstances involved including the persons involved and the place and nature of the use."

DUVAL asserted that it is not a use "off the land" within the true meaning of the rule enunciated for the State of Arizona in Bristor if under all circumstances surrounding the use equitable considerations recommend it. DUVAL went to considerable lengths in demonstrating that distance from the point of production is largely irrelevant so long as the use is upon lands overlying the body of groundwater from which the water to be used is pumped.

While the court in Bristor uses language arguendo compatible with the above statement, it does so only in connection with an unequivocal holding that the use, to be reasonable, must be "in connection with the beneficial enjoyment of the land from which it is taken" (75 Ariz. 237). In quoting from Rothrauf v. Sinking Spring Water Co., 339 Pa. 129, 14 A.2d 87, 90 (75 Ariz. 235, 236), the Arizona Supreme Court added its emphasis to the rule there enunciated by the Pennsylvania Court:

> "... there has been an ever increasing acceptance of the viewpoint that their use must be limited to purposes incidental to the beneficial enjoyment of the land from which they (waters) are obtained.
>
> * * *
>
> "While there is some difference of opinion as to what should be regarded as a reasonable use of subterranean waters, the modern decisions are fairly harmonious in holding that a property owner may not concentrate such waters and convey them off his lands if the springs or wells of another landowner are thereby damaged or impaired ..."
> (Emphasis the Arizona Supreme Court's)
> (Again cited with approval in Jarvis vs. State Land Department, 104 Ariz. 527, 456 P.2d 385).

In Jarvis the Arizona Supreme Court held that as a matter of law removal of groundwater from within a critical groundwater area for use outside of the critical area damaged the wells of the water users within the area. This would hold true whether the injured water user within the critical area pumped water for agricultural, domestic, industrial or municipal use.

> "Manifestly, a groundwater area or subdivision of a basin which does not have a reasonable safe supply for existing users can only be but further impaired by the addition of other users or uses." (456 P.2d 388)

In Bristor the court, after referring to the general language of Restatement of Law of Torts, Comments b and c, Section 852, which talks in general terms of factors involved in a consideration of reasonableness then immediately following the Restatement quotation held:

> "This rule does not prevent the extraction of groundwater subjacent to the soil so long as it is taken in connection with a beneficial enjoyment of the land from which it is taken." (75 Ariz. 237, 238)

In Bristor the use was clearly a "beneficial" use, since it was for the growing of agricultural

crops. The sole factor the court there weighed was: Did the use involve conveying the water away from the land from which it was produced?

It appeared clearly that the use involved:

> "... transporting the water thus pumped from under the plaintiffs' land to a distance of approximately three miles for the development and irrigation of lands not theretofore irrigated; that the waters pumped by the defendants are not used for any beneficial purpose upon the lands from which the same are taken..." (Emphasis added)

Bristor did not deal with a critical groundwater area and hence must be regarded as enunciating principles of water law of general application to be understood and applied in harmony with other principles specifically applicable to groundwater within a designated critical area.

The commitment of the court to this rule is demonstrated by the fact that in support of this holding and the companion or corollary holding that:

> "Such waters can only be used in connection with the land from which they are taken." (479 P.2d 172)

the court cited a full one and one-half column of cases in the Pacific Reporter.

Immediately following this impressive demonstration of the great weight of authority arrayed in support of the court's pronouncement the court stated:

> "Tucson questions whether it may pump water from its wells and transport the water so pumped through its pipelines to lands which lie within the watershed but outside the Marana Critical Ground-water Area. From what has been said concerning the American rule of reasonable use, the answer to Tucson's question is, of course, that it may not." (479 P.2d 172)

Following a quotation from Schenk v. City of Ann Arbor, 196 Mich. 75, 163 N.W. 109, at 114 (1917) our Supreme Court explained again why it had answered Tucson's questions in the negative:

> "We also pointed out in our first decision in this case that the Avra-Altar Valleys are a part of a critical water area, being included within the Marana Critical Ground Water Area. For the reason that a critical ground water area is a ground water basin or subdivision 'not having sufficient ground water to provide a reasonably safe supply for irrigation of the cultivated lands in the basin at the then current rates of withdrawal' we held that additional users would necessarily deplete the supply of the existing users. Consequently, the conveyance of ground waters off the lands on which wells in the

Avra Valley are located impairs the supply of the other land owners within the critical area." (Emphasis ours)

Had the court been of the view that location of the lands sought to be served within the Marana Subdivision would qualify such lands for water service it would have said so. It said bluntly that until it could be shown that users on these lands located outside of the Marana Critical Groundwater Area had such a physical relationship to the water supply underlying the Avra-Altar Valley that they could put their own pumps down and pump from the underground aquifer, delivery outside of the Critical Area would be illegal.

The court said:

> "Tucson's delivery of water to purchasers within the Avra-Altar drainage area but outside the Marana Critical Ground Water Area is, however, without equitable sanction. There is no indication in the record that these customers of Tucson overlie the water basin so as to come within the principle applicable to Ryan Field. Until Tucson can establish that its customers outside the Marana Critical Ground Water Area but within the Avra-Altar Valleys' drainage areas overlie the water basin so as to be entitled to withdraw water from it, there are no equities which will relieve it of the injunction heretofore issues." (Emphasis added)

In connection with service to Ryan Field, it is important to note that to permit service to that customer the court found

(a) Ryan Field lands overlie the Avra-Altar water basin and geographically it lies within the Marana Critical Groundwater Area so as to entitle it to withdraw water from the common supply for all purposes, except agriculture; and

(b) Ryan Field could itself legally withdraw water for domestic uses.

If, therefore, defendants would qualify under Jarvis II, they must show that its situs of use is so situated as to permit it to put down its wells at that location and withdraw its water supply from a water source which underlie its mine and mill. This they admit they cannot do.

The court made it plain that Bristor II was decided upon the basis that injury to the plaintiffs' wells was admitted for the purposes of the Motion to Dismiss since the plaintiffs had alleged the defendant "sucked the groundwater

from under plaintiffs' land thereby destroying plaintiffs' supply for their wells." (479 P.2d 171). The court went on to say:

> "Defendant transported the water a distance of three miles where he developed agricultural lands not theretofore irrigated. We held in Bristor, which holding was repeated in our first decision here, that this was not a reasonable use of groundwater". (479 P.2d 171)

Again the court emphasized in Jarvis II (p. 171, 479 P.2d):

> "In our first decision here, we also held that the American rule of reasonable use permitted percolating water to be extracted for the beneficial use of the land from which it was drawn. We emphasized this aspect of the doctrine of reasonable use by requoting from Bristor that part of the decision in Rothrauff v. Sinking Spring Water Co., 339 Pa. 129, 14 A.2d 87, to the effect that the modern decisions are nearly harmonious in holding that a property owner may not convey waters off the lands from which they are pumped if the wells of another are thereby damaged or impaired. This limitation on the use of ground waters has the overwhelming support of American precedent. Percolating waters may not be used off the lands from which they are pumped if thereby others whose lands overlie the common supply are injured."

In Jarvis I and Jarvis II the court was not considering the rights of the various farmers

of the Altar-Avra Valley vis-a-vis one another but was considering the rights of the irrigated area users versus the rights of the City of Tucson. This is shown by the court's references to Bristor and the quotations excerpted from that case with manifest approval.

Bristor and Jarvis I and II construed as stating harmonious principles teach:

Bristor = (a) Withdrawal of groundwater from any area and transportation of this groundwater away from the land from which it is withdrawn if by reason thereof the wells and water supply of an adjoining landowner are damaged is illegal;

Jarvis I and II = (b) Withdrawal of groundwater from the lands within a critical groundwater area and transportation of this water for use outside of the boundaries of the critical groundwater area, (unless the user at the situs of use has physical access to the groundwater resource of the critical area such that such users could at the situs of use physically withdraw an amount substantially equal to that pumped from

within and transported outside the boundaries of the critical area) is itself proof of damage to the critical groundwater user within the critical area and may be enjoined.

CONCLUSION

We apologize for the length of the brief. Perhaps all which has been said could have been put in fewer words. Since we believe the meaning and holding of Bristor II and Jarvis I and II clearly supports FICO's position we worry that perhaps we did not use enough words in the court below.

We respectfully urge that the Order appealed from should be reversed as an unlawful Order.

Respectfully submitted,

SNELL & WILMER

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STATE OF ARIZONA)
) ss:
County of Maricopa)

MARK WILMER, being first duly sworn, says:

Affiant mailed two copies of Appellant's Opening Brief to CHANDLER, TULLAR, UDALL & RICHMOND, attorneys for Appellees, properly addressed and postage prepaid on December 20, 1974.

Mark Wilmer
Mark Wilmer

SUBSCRIBED and SWORN to before me this 20th day of December, 1974.

Notary Public

My Commission Expires:

Sept. 17, 1976

APPENDIX 1

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The pertinent portions of our Ground Water Code are as set forth in the APPENDIX hereto. They are:

§ 45-301

1. "Critical groundwater area" means any groundwater basin as defined in paragraph 5 or any designated subdivision thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of the cultivated lands in the basin at the then current rates of withdrawal.

* * *

4. "Ground water" means water under the surface of the earth regardless of the geologic structure in which it is standing or moving. It does not include water flowing in underground streams with ascertainable beds and banks.

5. "Groundwater basin" means land overlying, as nearly as may be determined by known facts, a distinct body of ground water, but the exterior limits of a groundwater basin shall not be deemed to extend upstream or downstream beyond a defile, gorge or canyon of a surface stream or wash.

6. "Groundwater subdivision" means an area of land overlying, as nearly as may be determined by known facts, a distinct body of ground water. It may consist of any determinable part of a groundwater basin.

* * *

13. "User of ground water" means any person who is putting ground water to a beneficial use primarily for irrigation purposes.

14. "Well" means a pit, hole or shaft sunk into the earth in order to obtain ground water from a subterranean supply. As amended Laws 1959, Ch. 102, § 1; Laws 1968, Ch. 103, § 1.

NOTE: Subsection 14, § 45-301 prior to the 1968 Amendment defined "Well" as follows:

14. "Well" means only those wells used for irrigation or drainage and having a capacity of more than one hundred gallons of water per minute.

§ 45-302 Administrative powers and duties of department.

A. This article shall be administered by the state land department.

B. The department shall:

* * *

2. Compile and maintain records of the various groundwater basins and subdivisions in the state, together with factual data as to the safe annual yield of ground water and the use thereof in such basins and subdivisions to the end that the public may have an opportunity to understand groundwater resources and the steps necessary to obtain its maximum beneficial use.

C. The department may at reasonable times enter upon the lands of any groundwater basin or subdivision where a well or other works for the withdrawal of ground water are located for the purpose of examining such well or works subject to the provisions of this article, and for the purpose of obtaining factual data in a groundwater basin or any subdivision thereof.

§ 45-303. Designation of groundwater basins

A. The department shall, from time to time as adequate factual data become available, designate groundwater basins and subdivisions thereof, and as future conditions require and factual data justify, shall alter the boundaries thereof.

B. The designation or alteration of the boundaries of a groundwater basin or subdivision thereof may be initiated by the department, or by petition to the department signed by not less than twenty-five users or one fourth of the users of ground water in the groundwater basin or subdivision thereof, whichever is the lesser number.

C. Before designating or altering the boundaries of a groundwater basin or subdivision thereof the department shall prepare and file in its office a map thereof clearly showing and describing all lands included therein, together with adequate factual data justifying the designation or alteration of the boundaries of the groundwater basin or subdivision, whereupon the department may make and file an order designating the groundwater basin or subdivision. Such map and factual data, together with a

copy of the order of the department designating such basin or subdivision, shall remain a public record in the department and shall at all reasonable times be made available for examination by the public.

D. The designation or alteration of the boundaries of such groundwater basin or subdivision shall give the department reasonable access to the lands included therein, but shall not be construed as giving authority to regulate the drilling or operation of wells in the groundwater basin or subdivision.

§ 45-308 Designation or alteration of critical groundwater areas.

A. The department shall from time to time as adequate factual data become available justifying the action, designate critical groundwater areas, and as future conditions require and factual data justify, alter the boundaries thereof.

B. The designation of a critical groundwater area, or the alteration of the boundaries thereof, may be initiated by the department, or by petition to the department signed by not less than twenty-five users, or one-fourth of the users of ground water within the exterior boundaries of the groundwater basin or subdivision within which the lands proposed to be included in the critical groundwater area are located, whichever is the lesser number.

C. As soon as practicable after initiation of the designation or alteration of a critical groundwater area,

the department shall issue an order prohibiting any person from commencing the construction of any well within the proposed critical groundwater area without a permit therefor, unless and until, such prohibition is lifted by a subsequent order of the department after the hearing on the proposed critical groundwater area. Copies of the order of prohibition shall be served by certified mail to each person who has filed with the department, during the preceding twelve months, a "notice of intention to drill" within the proposed critical groundwater area and who has not submitted a "well driller's report" on such well.

D. The prohibition against commencing construction shall not operate to prevent the continuation of construction work when the extent of commencement of such work, on the day of the order, is consistent with the criteria prescribed by § 45-313, subsection C, provided that the department shall be furnished with an affidavit by the owner of the well attesting to the fact of that consistency before he continues with the construction. As amended Laws 1968, Ch. 103, § 2.

§ 45-309 Notice and hearing on critical area designation.

A. Before designating the proposed critical groundwater area, or altering the exterior boundaries thereof, a public hearing shall be held and conducted by the department.

B. Notice of the hearing shall be given by the department and shall include:

1. The legal description of the lands proposed to be included in the critical groundwater area.

2. The time when and place where the public hearing will be held, which shall be not less than four weeks after the first publication of the notice of hearing.

C. The notice, together with a map clearly showing and describing all lands proposed to be included in the critical groundwater area, shall be published once each week for four successive weeks in a newspaper of general circulation in the county or counties in which the lands or any part thereof are located. The publication of notice when completed shall be deemed to be sufficient notice of the hearing to all interested persons.

D. Any interested person may appear at the hearing, either in person or by attorney, and submit evidence, either oral or documentary, for or against the designation of the proposed critical groundwater area or alteration of the exterior boundaries thereof.

S 45-310 Findings of fact upon hearing; publication.

A. After conclusion of the hearing the department shall make and file written findings of fact with respect to the designation of the proposed critical groundwater area, or alteration of exterior boundaries of existing critical groundwater area, considered during the hearing. If in the findings of fact the department decides to designate a critical groundwater area, or alter the boundaries of an existing critical groundwater area, it

shall make and file an order designating the critical groundwater area, or altering the boundaries pursuant to the findings.

B. The findings of fact and order shall be published in the manner and for the length of time prescribed for the publication of notice of the public hearing, and when so published shall be final and conclusive unless an appeal therefrom is taken within the time and manner prescribed in § 45-321. All factual data compiled by the department to justify a hearing for the designation of a critical groundwater area, together with a copy of the findings of fact and map showing and describing the lands included in the critical groundwater area shall remain a public record of the department and shall at all reasonable times be made available for examination by the public.

C. A true copy of the map shall also be filed in the office of the county recorder of the county or counties in which the critical groundwater area is located.

§ 45-311. Modification of orders; dissolution of critical groundwater areas.

An order of the department issued pursuant to this article may be altered, modified or dissolved in the manner and at such times as provided in this article for the designation or alteration of a critical groundwater area, but no petition to abolish a critical groundwater area shall be received by the department within one year following a rejection of an identical petition.

STATE OF ARIZONA)
) ss:
COUNTY OF MARICOPA)

I Sheri Trego hereby certify:
Name

That I am Reference Librarian, Law & Research Library Division of the Arizona State
Title/Division
Library, Archives and Public Records of the State of Arizona;

That there is on file in said Agency the following:

Microfilm of Farmer's Investment Company v. Pima Mining Company et al, Arizona Supreme Court Case No. 11439-2, Appellant's Opening Brief, in Farmers Investment Company v. Anaconda Company, et al., filed March 17, 1975. Court of Appeals Instruments (Part Two) Page 124 with the Table of Contents and Table of Cases and Authorities (3 pages) and Brief (pages 1 through 75) following.

The reproduction(s) to which this affidavit is attached is/are a true and correct copy of the document(s) on file.

Sheryn Lega
Signature

Subscribed and sworn to before me this 12/15/05
Date

Notary Public State of Arizona
Maricopa County
Etta Louise Muir
My Commission Expires
04/13/2009

Etta Louise Muir
Signature, Notary Public

My commission expires 04/13/2009
Date